In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1428

PHYLLIS M. FENCL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted of willfully attempting to evade and defeat her federal income taxes for 1966 and 1967, in violation of Section 7201 of the Internal Revenue Code of 1954, 26 U.S.C. 7201. Petitioner was sentenced to three years' imprisonment, with sentence suspended in favor of ninety days' imprisonment in a jail-type institution to be followed by probation for the balance of the three-year term. The court of appeals affirmed (Pet. App. A). Petitioner's sole contention in this Court is that she should have been given a second *Miranda*-type warning upon the resumption, after several months, of the criminal tax investigation against her.

A revenue agent began to audit petitioner's tax returns in April 1968 and, having found indications of fraud, suspended his examination and referred the case to the Intelligence Division of the Internal Revenue Service. In July 1968, the revenue agent, together with Special Agent Houlihan, interviewed petitioner. Even though petitioner was not in custody, Houlihan read to her the full warnings of her constitutional rights spelled out in *Miranda* v. *Arizona,* 384 U.S. 436 (Tr. 86-87; Tr. M.S. 201; Govt. Ex. 2).[1] Subsequently, petitioner made incriminating oral admissions and turned over incriminating documents to Houlihan (Tr. 89-91). Soon thereafter, Houlihan suspended his investigation in order to concentrate on another case.

Almost one year later, in July 1969, petitioner was interviewed at her place of business by Special Agent Bell of the Intelligence Division, who explained that he was taking over the investigation from Special Agent Houlihan. Bell reminded petitioner that Houlihan had advised her of her rights previously, that she did not have to talk to the agents, and that she could have an attorney present (Tr. 55, 178; Tr. M.S. 240). Bell did not give petitioner the full *Miranda* warnings, because she had been advised of them earlier by Houlihan (Tr. M.S. 271). Bell subsequently interviewed petitioner on several occasions. All these interviews were non-custodial. Petitioner furnished Bell with the records she had earlier furnished to the other agents, and she made further incriminating admissions to him.

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[1] "Tr." refers to the transcript of trial proceedings. "Tr. M.S." refers to the transcript of the hearing on the motion to suppress.

Petitioner's sole contention—that Special Agent Bell should once again have read to her full warnings of the rights spelled out in *Miranda*—is without substance. Since she was not in custody, petitioner does not argue that she was entitled to such warnings as a matter of constitutional law; instead she relies upon published instructions promulgated by the Internal Revenue Service that require a special agent, on his first visit to a taxpayer, to give certain of the *Miranda* warnings (not including the proffer of legal aid, unless the taxpayer is in custody). But these instructions do not require the warnings to be repeated every time there is a change in the investigating personnel or a hiatus in the investigation. They apply only to the initial contact between the Intelligence Division and the taxpayer, at the initiation of the fraud investigation.

Furthermore, the policy behind the Service's instructions does not require a second warning. If proper initial warnings are given, as they were here, a later reminder of those warnings at the time the investigation is resumed is sufficient both to protect the Service against subsequent allegations of trickery or deceit and to reawaken the suspect's awareness of the seriousness of the investigation.

It is irrelevant that in this case almost a year intervened between the initial warning and the resumption of the investigation. Cf. *United States* v. *Mansfield*, 381 F. 2d 961 (C.A. 7), certiorari denied, 389 U.S. 1015. The cases suggesting that a second warning might be required after a substantial delay (Pet. 11-12) all involved custodial interrogation and therefore, unlike this case, implicated constitutional protections.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MAY 1974.